We do not wish it to be thought that in adopting so lenient a course we do not regard the matter as serious. We do. We think it is a very serious thing for a solicitor to act in this way; and we only hope that the solicitor in question will bear this in mind and will not misunderstand our indulgence when we say we do not propose to impose any penalty in this matter.

We think that justice will be done if a censure is recorded; which we so order.

The question arises as to costs. It is usual to require the respondent to pay costs in these cases. We think that the limit of our indulgence has already been reached in merely censuring Mr. Muthuswamy. He must pay the costs of the inquiry and of this hearing in Court.

Order accordingly.

Solicitors: *P. Coomaraswamy; L. A. J. Smith.*

SOH KWAN HONG & ORS. v. PUBLIC PROSECUTOR

[A. Cr. J. (Ong J.) October 2, 1961]

[J.B. — Criminal Appeal No. 25 of 1961]

Rubber Dealers Enactment, No. 65 Johore, s.13(ii) — Rubber estate labourers and rubber tappers — Charge of being a "forwarding agent."

The appellants, who were estate labourers or rubber tappers, were carrying rubber sheet and scrap out of an estate on their bicycles when they were stopped by the police. Each of them was subsequently charged of "being a forwarding agent did receive *x* sheets of rubber weighing *y* katties without a written authority from the consignor for the despatch thereof as required under section 13(ii) of the Rubber Dealers Enactment and thereby committed an offence punishable under section 18 of the said Enactment." They were each sentenced to a fine of $100, or one month's imprisonment.

Held: "to forward" means "to send on" and a "forwarding agent" is a person who receives rubber from a consignor for sale or consignment. In conveying the rubber from the estate to the estate owner, the appellants were acting merely as servants, carrying out the orders of their employer, and the latter, when issuing his orders to them did so as their employer and not as a consignor of goods. "Forwarding agent" must be read in its context with "consignor" and there cannot be one without the other.

CRIMINAL APPEAL.

Omar Salleh for the appellant.

Syed Abdul Rahman (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ong J.: These five appellants appeal against their conviction by the Magistrate at Pontian for an offence under section 13(ii) of the Rubber Dealers Enactment, No. 65 of Johore, for which each was sentenced under section 18 to a fine of $100, or one month's imprisonment.

The appellants, who were estate labourers or rubber tappers, were carrying rubber sheet and scrap out of an estate on their bicycles when they were stopped by the police at Parit Kudus. They were subsequently charged in similar terms, except as to the amount of rubber each was carrying at the time, and for the purposes of this appeal it is necessary only to set out here, as a specimen, the charge against the 4th appellant, which is as follows:

"That you on 12.2.61 at about 3.00 p.m. at Parit Kudus, Pontian in the State of Johore being a forwarding agent did receive 20 sheets of rubber weighing 45 katties and 1 sack of scrap rubber weighing 80 katties without a written authority from the consignor for the despatch thereof as required under section 13(ii) of the Rubber Dealers Enactment No. 65 and thereby committed an offence punishable under section 18 of the said Enactment."

The marginal note of section 13 reads: "Written authority for sale or consignment," and subsection (ii) is as follows:

"No forwarding agent shall receive any rubber, except upon delivery to him by the consignor of a written authority for the despatch thereof."

The only question for determination in this appeal is whether the appellants were "forwarding agents." The plain answer is "No", and I should have thought it plain as a pikestaff that estate labourers and rubber tappers can no more be called forwarding agents than the trishaw-pedaller, the bullock-carter or the lorry-driver who is instructed by me to bring out the rubber from my estate to my house or store. "To forward" means "to send on," and a "forwarding agent" is a person who receives rubber from a consignor for sale or consignment. In conveying the rubber from the estate to the estate owner, the appellants were acting merely as servants, carrying out the orders of their employer, and the latter, when issuing his orders to them did so as their employer and not as a consignor of goods. "Forwarding agent" must be read in its context with "consignor" and there cannot be one without the other. The appellants therefore were not guilty of the offence. I therefore allow the appeal and quash the convictions of all the appellants and order the fine to be refunded to each of them.

Appeal allowed.

Solicitors: *M. Ismail & Co.*

CHAN PHUAT KHOON v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Good JJ.A.) November 3, 1961]

[K.L. — F.M. Criminal Appeal No. 24 of 1961]

Evidence — Dying declaration — Evidence Ordinance, 1950, s.32 — Credibility of deceased.

The appellant was convicted on a charge of intending to cause miscarriage of a woman, an act which caused the death of the said woman, and was sentenced to four years' imprisonment. The only evidence which unequivocally connected the appellant with the subsequent abortion and death of the woman consisted of statements made by the deceased to her husband and to the doctor at the hospital prior to her death. These statements were admitted in evidence under section 32 of the Evidence Ordinance, 1950.

In the Court below the learned trial Judge discussed at length many issues in the case, but nowhere did he discuss the credibility of the dead woman.

Held: in the circumstances of the case the Court of Appeal were forced to the conclusion that the learned trial Judge did not apply his mind to the vital issue in the case, namely whether the credibility of the deceased could be relied on in this case. Thus the Court of Appeal were compelled to say that the conviction could not stand and it must be set aside.

COURT OF APPEAL (CRIMINAL).

David Marshall for the appellant.

Hamzah bin Dato Abu Samah (Deputy Public Prosecutor) for the respondent.

Thomson C.J. (delivering oral judgment): This appellant was prosecuted at the Johore Assizes on a charge that on 14th October, 1961, at Segamat he did, with intent to cause miscarriage of a woman named Pang Ngee Moi, an act which caused the death of the said woman and he thereby committed an offence punishable under section 314 of the Penal Code.

He was convicted of that offence and sentenced to four years' imprisonment.

Against that conviction he has now appealed.

There was in the case a great deal of evidence which, if it was true, was capable of supporting the conviction. In view, however of the conclusions at which we have arrived, it is not necessary and indeed would be undesirable to discuss that evidence in any detail.

The only observation we have to make regarding it is that the only evidence which unequivocally connected the accused the appellant with the subsequent abortion and death of the woman Pang Ngee Moi consisted of statements made by that woman to her husband and to the doctor at the hospital prior to her death. These statements were admitted in evidence bv reason of the provisions of section 32 of the Evidence Ordinance, 1950 and once they were admitted they became evidence of the facts contained in them. They were the voice of the woman speaking from beyond the grave. They were the substitute for the oral evidence which she could have given had she been alive.

We have examined the judgment of the trial Judge with very great care. He discusses at very great length and with considerable perspicuity a number of issues in the case. He discusses the medical evidence at length and comes to certain conclusions regarding it. He discusses the credibility of the woman's husband and comes to a certain conclusion regarding it. He discusses the credibility of the appellant and comes to certain conclusions regarding it. But nowhere does he discuss the credibility of the dead woman. In the circumstances and having regard to the care and detail with which he clearly applied his mind to the other issues in the case, we are forced to the conclusion that he did not apply his mind to the vital issue in the case, which was: did that voice from beyond the grave speak the truth? was it to be relied upon?

We are thus compelled to say that the conviction cannot stand and it must be set aside.

That is not the end of the matter. We have to consider what course the interests of justice now require should be taken. In the case there is an allegation, and I say no more than that regarding it, that a very serious offence against the public welfare and against the criminal law of this country has been committed. That allegation calls for the exercise of the judicial function regarding it. It follows from what has been said that that function has not been exercised by the trial Judge. We ourselves are unable to exercise it because though we are in as good a position as was the trial Judge to assess the value of what I have called the voice from beyond the grave that voice has to be heard with other voices and particularly the living voice of the appellant which we have not heard.

In the circumstances we are of the opinion that the interests of justice demand that the judicial function should be exercised by another Judge.

We accordingly order a re-trial.

Re-trial ordered.

Re KARUPAYA DECD.

[O.C.J. (Ismail Khan J.) November 17, 1961]

[Raub — Originating Motion No. 3 of 1961]

Probate and Administration — Application for leave to depose in a petition for probate and Letters of Administration death of deceased — Death not in doubt.

Where the fact of death is not in doubt, and the applicant can swear that death had occurred, no order is required on any application for Probate or Grant of Letters of Administration to swear that death had taken place.

Case referred to:—

(1) *In the Estate of Cecilia Long-Sutton* [1912] P. 97.

MOTION.

The applicant appeared in person.

Ismail Khan J.: This was an application by way of motion for an order giving leave to depose in a petition for Probate or Letters of Administration or distribution in respect of the estate of one Karupaya s/o Muniandi that the death of the said Karupaya occurred on the 17th day of February, 1950 at Sathnakottai Village, Ramnad District, South India.

In support of his application the applicant filed two affidavits, one his own and the other by a relative of the said Karupaya, one Raju s/o Vellasamy of No. 7, Mason Road, Raub. It would appear from these affidavits that the said Karupaya left for India in 1947 and went to live in his village Sathnakottai where he died on the 17th day of February, 1950. Both the applicant